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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-178536

November 27, 1973

40224

Electronic Corporation of America
5726 West Washington Boulevard
Los Angeles, California 90016

Attention: Mr. Brian Langford
Director of Engineering

Gentlemen:

We refer to your telefax of April 27, 1973, and letter of May 3, 1973, protesting the award of a contract to IIT Gilfillan (ITT) pursuant to request for proposals (RFP) No. DRA900-73-R-1184, issued September 26, 1972, by the Defense Supply Agency, Defense Electronics Supply Center (DESC), Dayton, Ohio.

The subject RFP requested offers for incremental quantities of a Pulse Forming Network, in accordance with IIT Gilfillan P/N 84041. Contract DRA900-73-R-6095 was executed with IIT on March 29, 1973.

You contend that your firm submitted an offer for the subject items at a price substantially lower than that of IIT, and that your firm designed and manufactured the original units for IIT in 1957 and maintain on file the original design and test data, parts list, and complete manufacturing drawings evidencing compliance with IIT's specifications. You state that you have no record of operational failure of the items nor any other evidence of non-compliance with IIT's specifications. You further state that you were not notified of the award by DESC through the prescribed notification procedure, but were first apprised of the award through the Commerce Business Daily of April 19, 1973.

A report of June 25, 1973 from the Defense Supply Agency advises that the procurement was negotiated under the authority of 10 U.S.C. 2304 (a)(10) and Armed Services Procurement Regulation (ASPR) 3-210.2 (xiii) on the basis that it was impracticable to obtain competition by formal advertising due to the unavailability of complete data. Your firm was one of six from which proposals were solicited, and offers were received from each one. Your offer was the second lowest while IIT's was the highest priced. Following the receipt of proposals, the low proposal was forwarded to the U.S. Army Electronics Command (USAEC), Fort Monmouth, New Jersey, the

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cognizant technical and engineering facility. USAEC reported back to DESC that the ITT drawing cited in the RTP was inadequate for procurement purposes, and that unsatisfactory performance reports were being received on the subject item being supplied under other contracts. It was explained that since 1958 there had been revisions to ITT drawing 84041, which imposed additional requirements, and since ITT had proprietary rights to the later revisions, the drawing could not be utilized for procurement purposes. In view of the large number of reported failures of the pulse forming networks at various Army facilities which might be traced to the 1958 version of the drawing USAEC recommended that if there existed any urgent requirement for the item, it should be purchased on a sole-source basis from ITT.

It was subsequently reported that Drawing 84041, Revision E, February 13, 1967, specified a 10,000-hour service test and that items furnished under past contracts, and not procured from ITT, had lasted only 150 hours.

On January 23, 1973, the contracting officer (DESC) was notified that the item was urgently needed due to a critical supply situation created by the termination of a predecessor contract for the item. Based thereupon, the contracting officer conducted sole-source negotiations with ITT and executed the subject contract for 125 units on March 29, 1973. By letter of May 21, 1973, the unsuccessful offerors were advised that due to the proprietary nature of Revision E, the USAEC had restricted negotiations to ITT.

DESC concedes that the post-award notice to unsuccessful offerors was not given in accordance with the prescribed ASPR procedures, and it states that the agency has taken steps to avert similar occurrences in future procurements.

A supplemental report dated July 31, 1973 sets forth further information pertaining to the reported proprietary status of the drawing.

Pursuant to a request of May 21, 1973 by DESC that USAEC document ITT's proprietary rights to the data, USAEC responded by letter of June 25, 1973 that a conversation with ITT led USAEC to believe that Revision E was proprietary, and that there had been a later revision to the drawing. Inasmuch as the requested documentation was not

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produced, DESC contacted ITT directly and was advised by letter of July 11, 1973, that neither Revision E nor subsequent Revision F, issued May 25, 1973, was proprietary.

Nevertheless, DESC states that the ITT drawing was inadequate for a competitive procurement since the contracts awarded subsequent to the promulgation of Revision E in February 1967 resulted in unsatisfactory items in each case. DESC reiterates its position of the earlier report that the data submitted by your firm was inadequate in that it was predicated upon the original drawing for the item which had been materially altered by ITT's subsequent revisions.

It is our opinion that the procurement history of the item presented an adequate basis for the conclusion that the drawing set forth in the RFP was inadequate for a competitive procurement. However, we do not understand how USAEC could have considered Revision E to be a proprietary drawing inasmuch as a number of contracts had been awarded to firms other than ITT since the drawing's issuance in 1967. In any event, the record indicates that adequate data were not available to DESC for a competitive procurement and could not be obtained and disseminated within the available time. Therefore we will not take exception to the legality of the sole-source award to the only firm which the procuring activity at the time believed capable of producing an acceptable item. See B-160291, February 17, 1967; B-161031, June 1, 1967; B-168819, May 4, 1970.

As previously noted the procuring activity concedes that notice of the award was not furnished promptly to the unsuccessful offerors as provided by ASPR 3-508.3. However, we regard this as a procedural defect that does not affect the legality of the award itself. B-176766, March 20, 1973.

Accordingly, we must deny your protest against the award. However, we are recommending to the Defense Supply Agency that an effort be made to develop a specification adequate for competitive procurement of the item in the future.

Sincerely yours,

Paul G. Dembling

For the Comptroller General
of the United States

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